

AUG 8 1986

SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

GEORGE F. RITCHIE,

*Respondent.**On Writ of Certiorari to the Supreme Court of Pennsylvania***BRIEF OF AMICI CURIAE****PENNSYLVANIA COALITION AGAINST RAPE AND
PENNSYLVANIA COALITION AGAINST DOMESTIC
VIOLENCE IN SUPPORT OF PETITIONER**

NANCY D. WASSER

Attorney for Amici Curiae

Suite 1425

1515 Market Street

Philadelphia, Pennsylvania 19102

(215) 864-9333

22/1/87

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.	ii
INTEREST OF THE AMICI CURIAE. . .	1
ARGUMENT	
THE COMMONWEALTH OF PENNSYL- VANIA'S SOUND PUBLIC POLICY PURPOSE, IN SAFEGUARDING THE CONFIDENTIALITY OF RECORDS OF REPORTED CHILD ABUSE, WILL BE EXTINGUISHED IF THE DECISION BELOW IS NOT REVERSED	3
CONCLUSION.	16

TABLE OF AUTHORITIES

CASES	<u>PAGE</u>
Delaware v. Fensterer, U.S. , 106 S.Ct. 292 (1985).	14
Delaware v. VanArsdall, U.S. , 106 S.Ct. 1431, (1986).	14
Ginsberg v. New York, 390 U.S. 629 (1968).	3
Illinois v. Gates, 462 U.S. 213 (1983).	11, 15
Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).	3
Roviaro v. United States, 353 U.S. 53 (1957)	11-12, 15
Smith v. Illinois, 390 U.S. 129 (1968).	15
Tennessee v. Street, U.S., 105 S.Ct. 2078 (1985)	14
CONSTITUTION AND STATUTES	
United States Constitution, Amendment VI.	14
11 PA.CONS.STAT.ANN §2201	4
11 PA.CONS.STAT.ANN §2203	4
11 PA.CONS.STAT.ANN §2204	5, 15
11 PA.CONS.STAT.ANN §2215	5

OTHER AUTHORITIES

Besharov, Child Abuse and Neglect, 22 Trial 8 (August 1986).	16
Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State interven- tion, 8 Harv.J.L. & Pub.Pol. 539 (1985).	7
D. Finkelhor, Child Sexual Abuse: New Theory and Research (1984).	10
1985 Child Abuse Report, Common- wealth of Pennsylvania, Depart- ment of Public Welfare, Office of Children, Youth and Families (May 1985).	6-7

INTEREST OF THE AMICI CURIAE

THE PENNSYLVANIA COALITION AGAINST RAPE (PCAR) is a state-wide coalition of sexual assault centers which sets standards for the delivery of services to child and adult victims of sexual assaults. PCAR operates a clearinghouse for its member organizations which provide direct counselling to victims of sexual assault and training for the victim counselors and advocates. PCAR also trains personnel of public and private institutions which provide direct services to sexual assault victims. In 1985, PCAR and its thirty-seven subcontracting organizations served 12,960 child and adult victims of sexual assault and provided 119,054 hours of direct services to those victims.

THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE (PCADV) is a state-wide

coalition of domestic violence centers which sets standards for the delivery of services to battered women and their dependent children. PCADV operates as a clearinghouse for its member organizations which provide shelter and direct counselling to victims of battering. In 1985, PCADV and its forty-four member organizations served 47,630 women and children and member organizations provided 127,388 shelter days.

Both PCAR and PCADV are not-for-profit organizations and are the sole source contractors, through the Pennsylvania Department of Public Welfare, for sexual assault and domestic violence services in Pennsylvania.

ARGUMENT

THE COMMONWEALTH OF PENNSYLVANIA'S SOUND PUBLIC POLICY PURPOSE, IN SAFEGUARDING THE CONFIDENTIALITY OF RECORDS OF REPORTED CHILD ABUSE, WILL BE EXTINGUISHED IF THE DECISION BELOW IS NOT REVERSED.

It is beyond cavil that a State has an "independent interest in the well-being of its youth..." *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) reh.den. 391 U.S. 971 (1968). Indeed, and as noted by this Court in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 472 n.8 (1981): "[A] State has even broader authority to protect the physical, mental, and moral well-being of its youth, than of its adults." It is within this jurisprudential framework that the Supreme Court of Pennsylvania's decision below must be assessed.

Identifying an "urgent need" to protect innocent child-victims of abuse and recognizing the vital importance of encouraging complete reporting of suspected child abuse, the Commonwealth of Pennsylvania enacted the Child Protective Services Law, 11 PA.CON.S.TAT.ANN. §2201, et seq. (Purdon's 1986).¹ Critical to the fulfillment of the salutary purpose of this law is a provision mandating the confidentiality of records maintained by the local child protective service agencies which are empowered to receive and investigate reports of child abuse and to provide counselling to abused children. In *sub silentio* striking that confidentiality provision down, the Supreme Court of Pennsylvania ravaged the entire statute.

¹Child Abuse is defined as "serious physical or mental injury...or sexual abuse or sexual exploitation, or serious physical neglect, of a child under 18 years of age..." 11 PA.CON.S.TAT.ANN. §2203.

Amici urge this Court to reverse and thereby restore to innocent child-victims of abuse the statutory safeguards which mandate that the identity of reporters and the counselling records of the victims of child abuse remain confidential.²

To allow the decision below to stand would discourage persons from reporting child abuse by removing the much-needed cloak of confidentiality and would concomitantly have a devastating impact on the ability of the State "to protect the physical, mental, and moral well-being of its youth" by interfering with the essential counselling services being provided to the child.

²The Child Protective Services Law creates two categories of reporters. The first category is commonly referred to as "mandated reporters" and the second encompasses all other persons. By statute "mandated reporters" include, *inter alia*, medical providers, school personnel, social service and other child care workers, mental health professionals and law enforcement officials. 11 PA.CON.S.TAT.ANN. § 2204(c). The identity of both classes of reporters is made confidential pursuant to this statute. 11 PA.CON.S.TAT.ANN. § 2215(a).

The position advanced by Amici finds strong statistical correlation in empirical evidence compiled by the Pennsylvania Department of Public Welfare, Office of Children, Youth and Families. In its 1985 Child Abuse Report, the Department charted the dramatic increase in reports of child abuse in the ten (10) years since the enactment of the Child Protective Services Law. In 1976, the first full year that the statute was in effect, there were 6,415 reports of suspected child abuse but that number doubled in 1977, with 12,939 cases. By 1985, there were 20,980 reports of suspected child abuse, an increase of 227% over the initial reports from 1976.³

³1985 Child Abuse Report, Commonwealth of Pennsylvania, Department of Public Welfare, Office of Children, Youth and Families (May 1985). Pennsylvania's statistical analysis reveals that 70% of all child abusers were in a parenting or guardian-type relationship to the child and that only 12% of the abusers were not related, by consanguinity or affinity, to the child. Moreover, in 1985, nearly half (46%) of the reports of suspected child abuse were made by persons not mandated by the Child

Extrapolating from these base numbers, it is statistically reasonable to assert that the progressive growth rate of reports of suspected child abuse will continue in the coming decade.⁴ But, it is also reasonable to conclude that reports of suspected child abuse will dramatically decline if the identity of heretofore anonymous reporters is disclosed to the abusers. This is so because child abuse typically occurs in private with only the most obvious symptoms of physical and psychological abuse being observable by others. Thus, the innocent child-victim will be relegated to the sec-

3(Cont'd.)
Protective Services Law to report. See 1985 Child Abuse Report, Charts 1, 3 and 9 (extrapolations).

⁴The same pattern of increased reports is evident from statistics compiled on a national level. In 1963, there were approximately 150,000 reports of suspected abuse but by 1972 there were 610,000 reports and in 1981, 1.3 million children were reported to be abused. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 Harv.J.L. & Pub. Pol. 539, 545 (1985).

ret confines of his or her abusers world, casting aside the "urgent need" to protect children who are the intended beneficiaries of the statute.

If, as the decision below requires, the identity of reporters is routinely disclosed to the perpetrators of child abuse, reports of suspected child abuse will decline resulting in continuing patterns of abuse as the offenders will remain safe from public revelation and punishment. The willingness of neighbors to become involved, to take the necessary first step of reporting suspected child abuse, will cease once that good neighbor is told that the suspected perpetrator may learn of his or her identity, simply by making a request for the name of the reporter. A person who learns of or observes evidence of suspected abuse against an innocent child, and makes a report, can

only logically assume that the same violent perpetrator will retaliate, armed with the knowledge that the innocent reporter has exposed his criminal behavior and subjected him to possible punishment. Similarly, the school teacher, nurse, social service or child care worker, all of whom are mandated reporters, may be reluctant to do so because of the obvious physical danger to themselves once their identity is revealed to the perpetrator. Likely, any retaliation would include the child and other siblings as well as the reporter and his or her family.

Absent an assurance that his or her identity will remain confidential, the willing neighbor (a voluntary reporter) and the concerned professional (a mandated reporter) will become unwilling participants in the escalated physical, mental and sexual exploitation of children, by opting not to come forward except in the most atrocious

cases.⁵ Thus, the net effect of permitting disclosure of the identity of reporters will be to dissuade reports of abuse. Yet, this is precisely the anomalous result of the Pennsylvania Supreme Court's decision -- a decision which analytically fails to consider precisely what hangs in the balance.

The competing policy concerns of the accused and the public may and have been struck in favor of confidentiality and against disclosure of the identity of the source of information. In an analagous context, involving anonymous informants or tipsters, this Court has affirmed the non-disclosure of identity as against an ac-

⁵Clinical studies of the long-term effects of child sexual abuse show alarming results. Stigmatization, reduced self-esteem, impaired adult adjustment and a susceptibility to continuing victimization have all been directly linked to such childhood experiences. See D. Finkelhor, Child Sexual Abuse: New Theory and Research, Chapter 12 (1984).

cused's assertion of his Sixth Amendment right to confront adverse witnesses. See *Roviaro v. United States*, 353 U.S. 53 (1957) (anonymous informant in narcotics case). See generally, *Illinois v. Gates*, 462 U.S. 213, 237-238 (1983) (adopting a totality of circumstances approach in cases where anonymous tipsters provide information which aids in establishing probable cause for search warrants and recognizing that "anonymous tips. . .frequently contribute to the solution of otherwise 'perfect crimes'.").

Indeed, the *Roviaro* Court groped with the tension which exists between an accused's Sixth Amendment rights and the state's fundamental interest in protecting its citizenry. Recognizing that an accommodation must be made, this Court resolved that the public interest extended beyond

mere private interest and explained its rationale as follows:

The purpose of the privilege [of withholding the identity of informants] is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligations of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Roviaro v. United States, 353 U.S. at 59.⁶

This admonition applies with equal force where the victims of crime are children and the adult perpetrators would escape, having accomplished the "perfect crime". The critical statement in **Roviaro** as applied to this case is the Court's refusal to adopt a *per se* disclosure rule. Rather, **Roviaro** made clear that "no fixed rule with respect to disclosure is justifiable".

⁶In **Roviaro**, the informant was not only a material witness who was present at the time of the drug transaction, but also played a prominent role in the

Roviaro v. United States, 353 U.S. at 62.

Here, without even considering the impact of its ruling the Pennsylvania Supreme Court adopted a *per se* rule, granting full disclosure of the entire file of information.

The Commonwealth of Pennsylvania reasonably and rationally adopted a confidentiality provision as regards particular reporters of suspected child abuse in order to embolden citizens "to communicate their knowledge of the commission of crimes". To dissuade these people from courageously stepping forward, by disclosing their identity, will send a clear message to reporters as it will have a chilling effect on the reporting process.

⁶(Cont'd.)
crime itself and was the only possible defense witness. Given this particular situation, the Court weighed the equities and required disclosure which if not made would result in dismissal.

During its last Term, this Court reiterated that the elemental guarantee of the Confrontation Clause of the Sixth Amendment is the opportunity for cross-examination of adverse witnesses. *Delaware v. VanArsdall*, U.S. , 106 S.Ct. 1431, 1435 (1986); *Delaware v. Fensterer*, U.S. , 106 S.Ct. 292, 295 (1985) (per curiam). But the Confrontation Clause is properly invoked only when a witness appears in court to offer probative, relevant, material and admissible evidence. Cf. *Tennessee v. Street*, U.S. , 105 S.Ct. 2078 (1985) (no violation of confrontation right where, on rebuttal, accused's co-defendant's confession read to the jury; co-defendant not offered as a witness.).

If an individual merely provides a source of information, whether as in *Roviaro/Gates* to provide some probable cause for an arrest or the issuance of a

search and seizure warrant, the Confrontation Clause is not implicated. Just as the identity of informants is not required to be disclosed, so too the identities of reporters of suspected child abuse should not be disclosed unless they are actually presented as a witness. Only then is identity a matter of constitutional dimension. See *Smith v. Illinois*, 390 U.S. 129 (1968).⁷ Absent the actual offering of testimony there is no legitimate public policy which mandates disclosure. To the contrary, sound public policy demands confidentiality -- to protect the rights of children who cannot themselves reveal

⁷The protection of mandated reporters is compromised by the mere fact that they have a statutory duty to report when based on their training and experience they have reason to believe that a child is abused. 11 PA.CON.S.TAT.ANN. §2204(1). They will be at further risk if their identity is routinely disclosed to a perpetrator.

what their tormentors have done to them⁸ and to protect the anonymous reporter from threats, harassment and potential physical harm. It is this public policy which the Supreme Court of Pennsylvania has extinguished and which must be reversed.

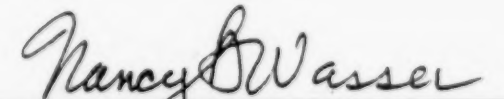
CONCLUSION

The State's paramount interest in protecting innocent child-victims of abuse is fostered by maintaining the confidentiality of the identity of reporters of suspected child abuse and of the records compiled

⁸Studies have shown that child abuse is significantly underreported. Professionals did not report "more than half of the maltreatment of children" they saw and "50,000 children with observable injuries severe enough to require hospitalization were not reported". The conclusion: "Nonreporting can be fatal". Besharov, Child Abuse and Neglect, 22 Trial 8 (August 1986) (relying on U.S. National Center on Child Abuse and Neglect, National Study of the Incidence and Severity of Child Abuse and Neglect, ch.6 (DDHS 1981)).

by child protective services agencies. *Amici* respectfully urge this Honorable Court to restore the confidentiality which is critical to encouraging complete reporting of child abuse by reversing the decision below.

Respectfully submitted,



NANCY D. WASSER
Suite 1425
1515 Market Street
Philadelphia,
Pennsylvania 19102
(215) 864-9333

COUNSEL FOR AMICI CURIAE